

September 16, 2008

Ms. Holly Case  
480 Almshouse Road  
Wyoming, DE 19934

**RE: Freedom of Information Act Complaint Against  
Camden-Wyoming Sewer and Water Authority**

Dear Ms. Case:

On August 4, 2008, the Delaware Department of Justice (DDOJ) received your complaint alleging that the Camden-Wyoming Sewer and Water Authority (“CWSWA”) violated the Freedom of Information Act (FOIA), 29 *Del. C.* § 10001 *et seq.*, by refusing to provide you with a copy of a “Management Comment Letter” from CWSWA’s auditors. On the same day, we sent your complaint to CWSWA, and we received their response on August 20, 2008. This is the DDOJ’s determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

**Statement of the Facts**

In April, 2008, you requested of CWSWA a copy of what you refer to as a “Management Comment Letter” that might have been issued by CWSWA’s outside auditors. According to a chain of emails that you have provided, and that I provided to CWSWA’s attorney, on April 24, 2008, CWSWA advised you that such a letter was issued and that it is “contained in the audit.” On April 26, 2008, you pointed out that no such letter was included in the records you received from CWSWA. On June 6, 2008,

CWSWA informed you that “[t]he board received it. It is not available for public distribution.” On June 13, 2008, CWSWA stated that its legal counsel advised that the letter not be made public, and that you could make a complaint to the Attorney General’s Office.

Although I asked CWSWA to include with its response to your complaint a confidential copy of the letter in dispute, it refused to do so, and instead provided a redacted letter dated January 17, 2008 to CWSWA from Dingle & Kane, P.A., certified public accountants. The unredacted text stated:

This letter does not affect our report dated January 17, 2008 on the financial statements of the [CWSWA].

We will review the status of this recommendation during our next audit engagement. We will be pleased to discuss this comment in further detail at your convenience, to perform any additional study of these matters or to assist you in implementing the recommendation. Our comment is summarized as follows:

This report is intended solely for the information and use of the Board of Directors, management and others within the Organization, and is not intended to be and should not be used by anyone other than these specified parties.

CWSWA takes the position that the last sentence makes the letter a confidential record of Dingle & Kane, and they cannot release it without Dingle & Kane’s permission. There is no indication that CWSWA has tried to obtain that permission.

#### **Relevant Statutes**

29 *Del. C.* § 10001 states that, “[i]t is vital in a democratic society . . . that

citizens have easy access to public records in order that the society remain free and democratic. Towards these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.”

29 *Del. C.* § 10003 provides that all public records must be made available to the public upon request for inspection and copying. A public record is defined as

information of any kind, owned, made, used, retained received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes[.]

29 *Del. C.* § 10002(g).

29 *Del. C.* § 10005(c) places the burden of proof on the public body to justify its refusal to allow a citizen access to records.

### **Discussion**

The burden is on CWSWA to prove that the January 17, 2008 Management Comment Letter is not a public record. It has not met this burden. In an email to CWSWA, you described a management comment letter as a document separate from the audit, in which “the auditors write to management and point out internal control deficiencies, or other ways that management could operate more efficiently,” and CWSWA has not disputed that definition. A management comment letter, as you have described it, meets FOIA’s definition of a public record; it is information that is “owned, . . . used, retained, received, . . . or otherwise . . . collected” by the public body for the purpose of conducting the public’s business. CWSWA has not relied on the redacted portions of the letter to justify their position, so apparently there is nothing in the redacted portions that would justify excluding the letter from the definition of a public record.

CWSWA says that it is not CWSWA's privilege, but Dingle & Kane's, that they are asserting. They cite no law to support their position. 29 *Del. C.* § 10002(g)(2) does exempt "commercial or financial information obtained from a person which is of a privileged or confidential nature" from the definition of public records. However, the management comment letter is not "commercial or financial information," it is the auditor's recommendation provided to a public body in conjunction with an audit. Under federal FOIA, which contains the same exemption,<sup>1</sup> the letter would only be exempt if it contained information that, if made public, would cause substantial harm to Dingle & Kane's financial or commercial interests or impair a public body's future ability to get a management comment letter from its auditor. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). There is no evidence that the letter contains any such information.

A record that meets the FOIA definition of a public record is not entitled to an exemption merely because the record's creator has designated it "confidential." For example, a settlement agreement that has a confidentiality clause is not thereby protected from disclosure under FOIA. *Del. Op. Atty. Gen 04-IB11*, 2004 WL 1147054; *Del. Op. Atty. Gen 02-IB24*, 2002 WL 31867898 ("A public entity cannot enter into enforceable promises of confidentiality regarding public records." (quoting *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Comm'rs*, 684 N.E.2d 1222, 1225 (Ohio 1997))). To allow that practice would subvert FOIA's purpose of making government accountable.

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<sup>1</sup> 5 U.S.C.A. § 552(b)(4).

### **Conclusion**

For the reasons stated herein, it is determined that the Camden-Wyoming Sewer and Water Authority violated FOIA in refusing to provide you with an complete copy of the January 17, 2008 letter from Dingle & Kane to the Board of Directors. The letter should be provided within five (5) business days of the date of this letter.

Very truly yours,

Judy Oken Hodas  
Deputy Attorney General

APPROVED

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Lawrence W. Lewis  
State Solicitor

cc:

Mary E. Sherlock, Esquire

Sarah Murray, Opinion Coordinator